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IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

LELAND R. COOK, JAMES RITCHIE, JOHN F. PRICE, LONNIE GIGERS, KELLY MAY, ISOM McMOORE, RUFUS PETTIS, HOPSON WILSON, I. B. WOODS and CURTIS J. NEAL,
Petitioners,

vs.

BROTHERHOOD OF SLEEPING CAR PORTERS, T. D. McNEAL, and MISSOURI PACIFIC RAILROAD COMPANY,
Respondents.

BRIEF

Of Respondent Missouri Pacific Railroad Company in Opposition to Petition for Writ of Certiorari.

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BRIEF

Of Respondent Missouri Pacific Railroad Company in Opposition to Petition for Writ of Certiorari.

QUESTIONS PRESENTED.

1. Whether the State Court had jurisdiction, in view of the primary jurisdiction of the National Railway Adjustment Board, to enjoin the discharge of petitioners by respondent Railroad because of petitioners' failure to join respondent Brotherhood, as required by the union shop contract between the Brotherhood and the Railroad, where petitioners were not notified of the Brotherhood's intention to enter into such contract, and did not as individuals authorize the contract.

2. Whether, even if the State Court had jurisdiction, it could have granted the relief sought by petitioners in view of their admitted failure to comply with the terms of the union shop contract.

STATEMENT.

Petitioners are classified for collective bargaining purposes as "train porters" (R. 1). Respondent Brotherhood of Sleeping Car Porters, which we will call the Brotherhood, is the duly designated representative of petitioners' craft (R. 2). On March 9, 1953, the Brotherhood and respondent Missouri Pacific Railroad, which we will refer to as the Railroad, entered into a union shop agreement which required all members of petitioner's craft to join the Brotherhood before June 1, 1953 (R. 4-5).

On March 13, 1953, four days after the signing of the union shop agreement, the Brotherhood wrote to the petitioners calling their attention to the provision of the agreement requiring them to join the Brotherhood before June 1, 1953 (R. 244-246). When no reply to this letter was received from petitioners, the Brotherhood on May 21, 1953 wrote a second letter to each of them, reminding them of the deadline for joining, and stating that if they did not become members before June 1, the Brotherhood would "have no choice but to serve notice on the Missouri Pacific to terminate your employment and seniority under our working agreement" (R. 246, 247).

At the time the contract was entered into and at the time of trial, petitioners were members of the International Association of Railway Employees (hereafter referred to as the Association), a labor organization which was a rival to the Brotherhood (R. 248, 269). Petitioner Gigers was president of the St. Louis local organization of the Association, petitioner Cook was its vice-president, and petitioner May was its secretary (Def. Ex. V, R. 274). After the union shop agreement was made, the Association advised at least one of the petitioners not to comply with the agreement (R. 115, 116), and the local Association ad-

vised all of the petitioners that they would be "protected" by the Association (Def. Ex. V, R. 272-275).*

None of the petitioners joined the Brotherhood (R. 247).

After June 1, each of the petitioners received from the Railroad a notice of non-compliance with the union shop agreement, and each petitioner then requested a hearing (R. 247). Each was given a hearing, and each admitted at the hearing that he had failed to join the Brotherhood before June 1 (R. 247). At each hearing a representative of the Brotherhood proposed that if the employee (although he was then in default) would join the Brotherhood at that time, the Brotherhood would be willing to drop the discharge proceedings. Each petitioner refused to do so (R. 247, 248).

After the hearings each petitioner received a letter from his superintendent ruling that he had failed to comply with the union shop agreement. Thereafter each petitioner appealed to the Railroad's chief personnel officer, as provided by the agreement, and in each case the superintendent's ruling was affirmed by the chief personnel officer without further hearing, but after reviewing the record of the initial hearing (R. 248).

Thereafter each petitioner requested appointment of a Neutral to review the decision of the chief personnel officer, as provided by the union shop agreement (R. 248).

About five months after the deadline for joining the Brotherhood, and shortly prior to the hearing before the

* In their original petition in the State Court, the petitioners asked for a declaratory judgment that, as members of the Association, they could not be required under the Railway Labor Act, to join the Brotherhood as a condition of their continued employment (R. 269). The allegations of the original petition to the effect that petitioners were members of the Association, that the Association was national in scope, and that petitioners therefore could not be required to join the Brotherhood, were abandoned when the amended petition was filed (R. 1-13).

Neutral in November, 1953, petitioners tendered their "joining fees" to the Brotherhood under protest (Pl. Exs. 67-78, R. 90; R. 86, 248). The tender was refused by the Brotherhood (R. 248).

In the case of each appeal, the Neutral, after hearing, sustained the Railroad's decision (Pl. Ex. 93, R. 109, 110; R. 248). Pursuant to the Neutral's decision the Railroad was about to discharge petitioners when the present suit was brought.

ARGUMENT.

I.

The State Court Properly Dismissed Petitioners' Suit for Want of Jurisdiction, Because Primary Jurisdiction of Such Proceedings Lies With the National Railway Adjustment Board.

The issues raised by the present petition for certiorari have either been passed on by this Court or have been raised in other cases in which this Court has denied certiorari. The trial court held (R. 317, 318) that under **Alabaugh v. B. & O. R. Co.**, 125 F. S. 401 (1954), 222 F. 2d 861 (1955), cert. den. 350 U. S. 839 (1955), it had no jurisdiction to entertain petitioners' suit. In **Alabaugh** the facts were almost identical to those presented here.* Plaintiffs, who were employees of the B. & O. Railroad, had been members of defendant Brotherhood of Locomotive Engineers, but after a union shop agreement was entered into between the Brotherhood and the B. & O., dropped their membership in the Brotherhood and joined UROC,

* Petitioners seek to distinguish the *Alabaugh* case on several grounds, all of which we believe to be differences without distinction. But some of the claimed differences we believe to be erroneously claimed. For example, petitioners say (Petition p. 19) that in the *Alabaugh* case no substantial question was raised as to the validity of the union shop agreement. In the district court opinion in the *Alabaugh* case it is pointed out (125 F. S., l. c. 406) that plaintiffs there claimed that the union shop agreement was invalid because it contained a provision not authorized by the 1951 amendment to the Railway Labor Act, which is one of the contentions made by petitioners here. Again, petitioners say (Petition p. 20) that in *Alabaugh* no question was raised as to whether the tender of initiation fees prior to discharge made it mandatory that the employes be admitted to membership. Certainly, a most similar, if not identical, question was raised in *Alabaugh*. The circuit court of appeals (222 F. 2d, l. c. 863, 864), notes that plaintiffs there contended that the union had discriminated against them by refusing to reinstate them (they had formerly been members and dropped their memberships to join a rival union) when they applied for

a rival labor organization, believing it to be national in scope. The Brotherhood expelled plaintiffs and called on the B. & O. to discharge them. After a hearing before one of the railroad's superintendents, who held that plaintiffs must be discharged, plaintiffs concluded that UROC was not a qualified union, and applied for reinstatement in the Brotherhood which, according to plaintiffs' petition, was refused by the Brotherhood because plaintiffs had been active in UROC, although other engineers, who had also terminated their membership in the Brotherhood but had been less active in UROC, were reinstated. Appeals were taken to the chief personnel officer, who affirmed the superintendent's decision and fixed a date for discharge. Plaintiffs then filed suit to restrain the railroad from discharging them and to restrain the Brotherhood from inducing their discharge. The district court held that it had no jurisdiction because primary jurisdiction of the matter was exclusively with the Railway Adjustment Board. The court said (125 F. S., l. c. 408, 409):

> "So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B & O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board."
>
> * * * * * * *
>
> "The remedy before the Adjustment Board is adequate. It has jurisdiction to declare a discharge improper and to require a railroad to reinstate the employee with back pay. Slocum v. Delaware L. & W. R. Co., 339 U. S. 239, at page 244, 70 S. Ct. 577, 94 L. Ed. 795. There is no lack of administrative remedy here such as existed in the Steele, Tunstall and Howard cases. Until the Adjustment Board acts, plaintiffs cannot show irreparable loss and inadequacy of legal remedy. Order of Railway Conductors v. Pitney, 326 U. S. 561, at page 567; 66 S. Ct. 322, 90 L. Ed. 318."

On appeal to the Fourth Circuit Court of Appeals that court affirmed, saying (222 F. 2d, l. c. 864, 865):

> "We think that the suit was properly dismissed by the court below for failure of the plaintiffs to exhaust administrative remedies before the National Railroad Adjustment Board, which has been given by Congress primary original jurisdiction over controversies of this sort."
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> * * * * * * * *
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> "The case here involves the rights of employees under a union shop agreement arrived at by collective bargaining. The interpretation of that agreement and the rights and grievances of employees thereunder are just the sort of matters that Congress intended to be handled in the first instance by the National Railroad Adjustment Board."
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> * * * * * * * *
>
> "This is one of a number of cases in which controversies have arisen under union shop agreements because of the joining of UROC by members of the Brotherhood; and it has been repeatedly held in these cases that there is no jurisdiction in the courts over controversies of this character in the absence of exhaustion of remedies before the Board."

Certiorari was sought and was denied by this Court. **Alabaugh v. B. & O. Ry. Co.**, 350 U. S. 839 (1955).

The same result was reached in **Johns v. B. & O. R. Co.**, 118 F. S. 317 (1954), 347 U. S. 964 (1954). In the **Johns** case a similar suit had been brought by a UROC member to enjoin his discharge. He invoked the jurisdiction of a statutory three-judge court by alleging the unconstitutionality of the union shop amendment to the Railway Labor Act. The three-judge court held that it was without jurisdiction. Although its holding turned on the narrow issue

the court's conclusion that no such question was raised depended, in turn, on its view that primary jurisdiction lay with the Railway Adjustment Board. The court said (118 F. S., l. c. 320, 321):

> "Section 3 of the Act, 45 U. S. C. A., Sec. 153, created the National Railroad Adjustment Board, composed of members selected by the carriers and nationally recognized unions. This Board is given power on petition of either party to a labor dispute between an employee and a railroad to decide the dispute and make awards, including back pay awards enforcible by process in the district courts. The case at bar is one of a great number of similar cases now pending, or decided within the past year, prosecuted by UROC or its members to contest the discharge of its members for non-compliance with union shop agreements. In all of these reported cases, with one exception, the courts have held that this issue is a dispute, within the meaning of Section 3, First (1), cognizable by the Board, and that the courts are without jurisdiction."
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> * * * * * * *
>
> "Furthermore, the existence of the administrative remedy in this case more clearly impels us to hold that no cause is presented for consideration by three judges. That the remedy afforded to an aggrieved employee by Section 3 of the Act must be exhausted before resort is had to the courts has been reiterated in numerous decisions, applying the Act."

Plaintiff appealed to this Court, and in a per curiam decision without opinion, this Court affirmed the three-judge court. **Johns v. B. & O. R. Co.**, 347 U. S. 964 (1954).

Petitioners seek to distinguish the **Alabaugh** case (Petition p. 19) because no question was raised there as to the necessity of the Brotherhood notifying those whom it represented of its intention to negotiate a union shop agreement.

Petitioners argue that the union shop agreement in the case at bar was void because of such lack of notice, and therefore that the State Court had jurisdiction. This Court, in **Elgin J. & E. Ry. Co. v. Burley**, 325 U. S. 711 (1945), expressed its view that a union designated as a bargaining agent under the Railway Labor Act does not have to notify those whom it represents of its intention to negotiate a contract with a carrier. In the **Elgin** case, the question was whether the Brotherhood of Railroad Trainmen could prosecute and compromise time claims of its members, without notice to them. This court carefully pointed out the difference between the authority of the union, conferred by the Railway Labor Act, to enter into prospective agreements binding on all members, and its authority to handle grievances of individual members. The court concluded that in settling grievances, such as time claims, the employee was entitled to notice and an opportunity to participate, **even though no such notice was necessary for the union to enter into a valid collective bargaining agreement.** In the latter situation, the Act itself confers full authority on the union. The court said (325 U. S., l. c. 728, 740):

> "The statute itself vests exclusive authority to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent. Cf. Virginian R. Co. v. System Federation, R. E. D., 300 U. S. 515, 81 L. ed. 789, 57 S. Ct. 592, supra. Since the entire statutory procedure for settling major disputes is aimed only at securing agreement and not decision, unless the parties agree to arbitration, this exclusive authority includes representation of the employees not only in the stage of conference, but also in the later ones of mediation, arbitration and conciliation.
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> . . . . . .
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> "The Brotherhood had power, therefore, **as collective agent** to make an agreement with the carrier, effective for the future only, to settle the question of

starting time, and that power was derived from the Act itself. **In dealing within its scope, the carrier was not required to look further than the Act's provisions to ascertain the union's authority.**" (Emphasis supplied.)

Although this Court's declaration of the law in **Elgin** was not part of its holding, the question was squarely presented in **McMullans v. K. O. & G. Ry. Co.**, 129 F. S. 157. (1955), 229 F. 2d 50 (1956), cert. den. 351 U. S. 918 (1956). There, an agreement was negotiated between the railroad and the certified brotherhood providing for compulsory retirement of engineers at age 70. Plaintiffs contended (as petitioners do here) that the agreement was void because no notice had been given to them, and also contended (as petitioners do here) that the agreement deprived them of property rights protected by the Fifth Amendment. The Circuit Court of Appeals said (229 F. 2d, l. c. 56):

> "These contentions are without merit. It is conceded that the B. L. F. & E. was the duly selected and certified bargaining agent for the craft including these plaintiffs, with authority to contract with the railroad on matters relating to rates of pay, rules and working conditions. The Railway Labor Act requires railroads to 'treat with' certified representatives of the employees and with no others. 45 U. S. C. A., Sec. 152, Ninth; Virginian R. Co. v. System Fed. No. 40, 300 U. S. 515, 545, 548, 57 S. Ct. 592, 81 L. Ed. 789; Lewellyn v. Fleming, supra. In the Lewellyn case (154 F. 2d 213), it was stated that the Act 'undoubtedly included the authority to prospectively contract with reference to seniority rights of the members of the craft, whether members of the union or not.' The compulsory retirement provisions of the contract with which we are dealing are prospective, and are not retroactive in any respect. They do not affect rights already accrued. They seek to change existing terms of the contract

and to apply those changes in the future. This, the bargaining agent has the power to do. Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 739, 65 S. Ct. 1282, 89 L. Ed. 1886. The contractual provisions were for the collective interests of all the employees represented, even though some were adversely affected. Since the Railway Labor Act does not create a permanent status for employees or fix unlimited tenure in their jobs, there was no violation of the plaintiffs' Constitutional rights.

"The bargaining agent is the representative of the craft and is not required to consult with individual members or to give them notice of contemplated contractual actions within the scope of its authority."

Certiorari to this Court was sought, and was denied. **McMullans v. K. O. & G. Ry. Co.**, 351 U. S. 918 (1956).

We submit that the **Alabaugh, Johns, Elgin** and **McMullans** cases settle the question presented here, and that the State Court was clearly right in holding that it had no jurisdiction.

II.

Even If the State Court Had Jurisdiction, It Could Have Awarded No Relief to Petitioners, Because They Failed to Join the Brotherhood as Required by the Union Shop Agreement, and the Railroad Was Required Under the Agreement to Discharge the Petitioners.

Admittedly, the union shop agreement required all employees represented by the Brotherhood to join the Brotherhood before June 1, 1953 (Pl. Ex. 2, R. 15). No contention is made that petitioners joined within the required period. Petitioners, however, contend that in equity they should not be discharged because they tendered their joining fees to the Brotherhood before actual discharge.

Let us examine the facts. After the agreement was entered into on March 9, 1953, the Brotherhood wrote to each of the petitioners on March 13, calling their attention to the agreement's provision that all train porters were required to join the Brotherhood before June 1, 1953 (R. 244-246). When no reply to this letter was received, the Brotherhood on May 21, 1953, wrote a second letter to each of the petitioners, warning them that if they did not comply with the agreement the Brotherhood would call on the Railroad to terminate their employment and seniority (R. 246, 247). In spite of this letter the petitioners failed to join.

Thereafter, each petitioner received from the Railroad a notice of non-compliance with the union shop agreement, and each petitioner then requested a hearing (R. 247). Each was given a hearing, and each admitted at the hearing that he had failed to join the Brotherhood by June 1 (R. 247). **At each hearing a representative of the Brotherhood proposed that if the employee (although he was then in default) would join the Brotherhood at that time, the Brotherhood would be willing to drop the discharge proceedings.** Each petitioner refused to do so (R. 247, 248).

Five months after the deadline for joining the Brotherhood and shortly prior to the hearing before the Neutral in November, 1953, petitioners for the first time tendered their joining fees. This tender was refused by the Brotherhood (R. 248).

Petitioners contend this was a proper tender. They rely on **National Labor Relations Board v. Aluminum etc. Union,** 230 F. 2d 515 (1956). This case merely held that plaintiff was entitled to reinstatement in her union when she had in good faith tendered her dues at a time when they would have been payable under a union by-law which, unknown to plaintiff, had been changed to make the dues

payable earlier. Plainly petitioners' situation is not even remotely similar to that of the plaintiff in the **N. L. R. B.** case.

Petitioners' position on the question of tender is like that of the plaintiffs in **Alabaugh v. B. & O. R. Co.**, 125 F. S. 401 (1954). There, plaintiffs were members of a rival union, U. R. O. C., and either had failed to join or had dropped membership in the Brotherhood of Locomotive Engineers. However, when their discharge became imminent, plaintiffs sought reinstatement in the Brotherhood and contended, as petitioners do here, that it would be discriminatory not to allow them to be reinstated. The District Court said (125 F. S., l. c. 407, 408):

> "Plaintiffs contend that Brotherhood's refusal to reinstate them is a discrimination analogous to the discriminations in the Steele, Tunstall and Howard cases.
>
> "In those cases contracts between the union and the carrier were declared invalid because the union had negotiated contracts which clearly discriminated against the Negro members of the bargaining unit solely because of their race.*
>
> "The situation in our case is quite different. Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B. & O. under the terms of the union shop agreement, unless they could show that U. R. O. C. was a labor organization which qualified under section 152 Eleventh (c). They could have hedged their bet by continuing to pay dues to Brotherhood after joining U. R. O. C., pending

* In the case at bar there is no issue of racial discrimination.

determination of U. R. O. C.'s status. If they had continued to pay dues to Brotherhood, that union might have expelled them for dual unionism, but B. & O. could not have discharged them, in view of the provisions of section 152 Eleventh (c). They would have continued in their employment as 'free riders.' But they chose to stake all on U. R. O. C. Having lost, they sought reinstatement in Brotherhood.

"When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with the B. & O. which requires such action.

"The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that 'they that take the sword shall perish with the sword' unless some constitutional or other legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in U. R. O. C. create any right in plaintiffs to secure an order for reinstatement in this case."

The Court will recall that the foregoing decision was affirmed by the Fourth Circuit Court of Appeals (222 F. 2d 861), and that this Court denied certiorari (350 U. S. 839).

III.

Even If the State Court Had Jurisdiction and Could Have Granted Relief, This Court Should Not Grant Certiorari Since No Federal Question Is Involved.

No federal question is involved in this case. As stated above, petitioners are members of the International Association of Railway Employees. No contention is made by them that the Association is national in scope or has been certified as such under Section 3, First, of the Railway Labor Act (48 Stat. 1189, 45 U. S. C. Section 153 First (i)

In fact, it has not been (R. 314-316). Since the Association was not so qualified, petitioners had no federal right to join the Association in lieu of the respondent Brotherhood of Sleeping Car Porters, their authorized bargaining representative. Accordingly their threatened discharge does not raise any federal question. **Pennsylvania R. Co. v. Rychlik**, 352 U. S. 480, 485 (1957). Nor is any substantial constitutional question presented under the Fifth Amendment. **McMullans v. K. O. & G. Ry. Co.**, 129 F. S. 157 (1955), 229 F. 2d 50 (1956), cert. den. 351 U. S. 918 (1956).

CONCLUSION.

We submit that the State Court had no jurisdiction of this suit, because primary jurisdiction of such matters has been conferred by Congress on the Railway Adjustment Board. However, if the State Court had assumed jurisdiction, it could have granted no relief to petitioners since, under the facts shown at the trial, the Railroad was obligated to discharge them. In any event, this Court should not grant certiorari since no federal question is involved.

Respectfully submitted,

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